

The opinion in support of the decision being entered today
is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ERIC P. PLOURDE and KEVIN P. OLECHOWSKI

Appeal 2007-2067
Application 09/998,502
Technology Center 3677

Decided: September 12, 2007

Before DONALD E. ADAMS, ERIC GRIMES, and RICHARD M.
LEBOVITZ, *Administrative Patent Judges*.

ADAMS, *Administrative Patent Judge*.

DECISION ON APPEAL

This appeal under 35 U.S.C. § 134 involves claims 1-4, the only
claims pending in this application. We have jurisdiction under 35 U.S.C.
§ 6(b).

INTRODUCTION

The claims are directed to a variable alignment zipper. Claim 1 is illustrative:

1. A variable alignment zipper comprising:

a first interlockable profile having a longitudinally extending web portion and having a longitudinally extending locking portion, said locking portion of the first profile having a plurality of continuous shaped ribs extending therealong, said ribs having a central tip and barbs extending laterally at each side of the tip with the barbs providing a first interlocking contact area;

a second interlockable profile having a longitudinally extending web portion and having a longitudinally extending locking portion, said locking portion of the second profile having a plurality of continuous shaped ribs extending therealong with one and only one of said ribs having a central tip and a pair of barbs extending laterally at each side of the tip and said rib with a central tip of said second profile bordered by two of said ribs shaped with a distal end with one and only one barb extending laterally from the distal end with the barbs providing a second interlocking contact area;

a first plurality of continuous grooves therebetween the ribs of said second profile, said first plurality of continuous grooves receptive in at least one interlocking relationship to the locking portion of said first profile, whereby ribs adjacent to said one and only one rib having a central tip and a pair of barbs flex outwardly in said interlocking relationship, and are free of flexing inwardly into any of said first plurality of continuous grooves.

The Examiner relies on the following prior art reference to show unpatentability:

Tomic

US 6,217,215 B1

Apr. 17, 2001

The rejection as presented by the Examiner is as follows:

Claims 1-4 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Tomic.

We affirm.

DISCUSSION

Tomic teaches a closure arrangement for a flexible package. For clarity, we reproduce Tomic's Fig. 7 below.

FIG. 7

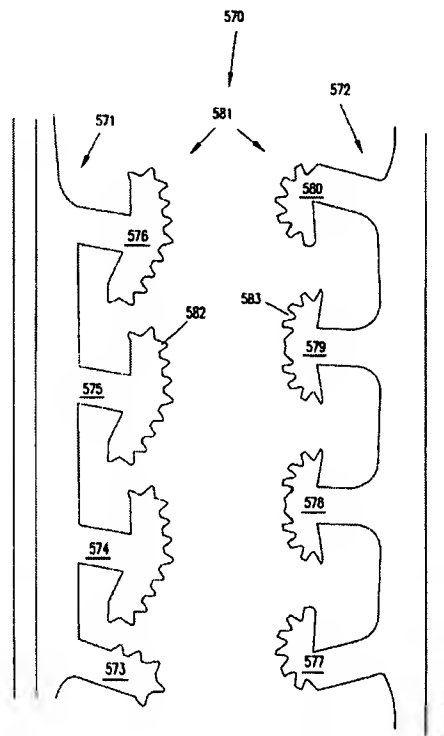


Fig. 7 is stated to represent “an enlarged, fragmented, cross-sectional view of another alternate embodiment of a tactile feedback system, being a multi-

track zipper having tactile feedback snaps and depressions, according to an example embodiment” of Tomic’s invention (Tomic, col. 2, ll. 36-40).

As illustrated in Tomic’s Fig. 7,

1. Tomic’s zipper comprises a first and second closure profile (571 and 572 respectively) (Tomic, col. 8, ll. 7-8).
2. The first closure profile (571) comprises a first, second, and third profile element (574, 575, and 576 respectively) (Tomic, col. 8, ll. 11-13).
3. The second closure profile (572) comprises a first, second, third, and fourth profile element (577, 578, 579, and 580 respectively) (Tomic, col. 8, ll. 13-16).
4. The first and second closure profiles (571 and 572) “are designed and constructed to engage with each other” and “may include any number of profiled elements” (Tomic, col. 8, ll. 16-19).
5. Feedback ridges or ribs (582), or feedback depressions (583) are associated with the profile elements (Tomic, col. 8, ll. 22-29).
6. “[A]ny combination of feedback ribs or depressions, having any size or shape, may be used on the first and second closure profiles 571, 572” (Tomic, col. 8, ll. 37-39, emphasis removed).

According to the Examiner, Tomic teaches “a closure mechanism (570) comprising a first inter-lockable profile (571) having a longitudinally extending web portion and having a longitudinally extending locking portion . . .” (Final Rejection 2; Tomic Fig. 7). The Examiner finds that Tomic teaches that “the locking portion of the first profile ha[s] a plurality of continuous shaped ribs (574, 575, 576) extending there-along, the ribs having a central tip and barbs extending laterally at each side of the tip with

the barbs providing a first interlocking contact area” (*id.*). The Examiner finds that Tomic teaches

[a] second inter-lockable profile (572) having a longitudinally extending web portion and having a longitudinally extending locking portion, the locking portion of the second profile having a plurality of continuous shaped ribs (578, 579) extending there-along with at least one of the ribs having a central tip and a pair of barbs extending laterally at each side of the tip and the ribs with a central tip of the second profile bordered by at least two of the ribs (577, 580) shaped with a distal end with one and only one barb extending laterally from the distal end and extending laterally to at least one of the ribs having a central tip with the barbs providing a second inter-locking contact area.

(*id.*) The Examiner finds that Tomic teaches

[a] first plurality of continuous grooves (U-shaped or bowl-shaped recess areas) there-between the ribs of the second profile, the first plurality of continuous grooves receptive in at least one inter-locking relationship to the locking portion of the first profile, whereby ribs adjacent the ribs having a central tip and a pair of barbs flex outwardly in the interlocking relationship.

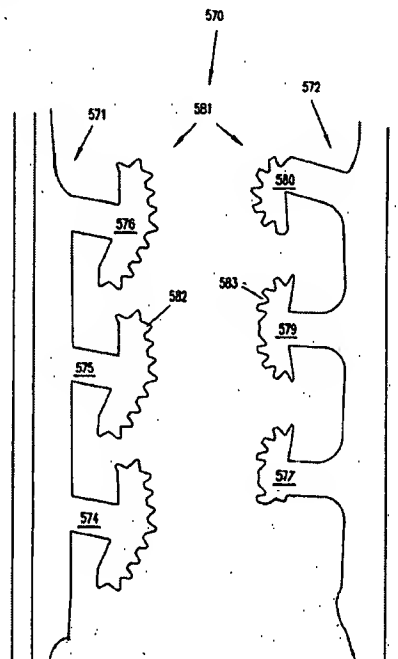
(Final Rejection 2-3.)

The Examiner recognizes, however, that Tomic does not teach “that the ribs are free of flexing inwardly into any of the plurality of grooves or that the second inter-lockable profile has one and only one of the ribs having a central tip and a pair of barbs extending laterally at each side of the tip” (Final Rejection 3) as required by claim 1. Nevertheless, based on Tomic’s teachings, the Examiner concludes that

it would have been obvious to one having ordinary skill in the art at the time of applicant's invention to modify the closure mechanism of Tomic to reduce the number of ribs having a central tip and a pair of barbs extending laterally thereof, from two to one for the purpose of reducing material and overall cost of manufacture while maintaining a balanced tactile feel.

(Final Rejection 3.) To illustrate this point, the Examiner provides a modified version of Tomic's Fig. 7 (Answer Appendix Fig. 7B). For clarity, the Examiner's modified figure, Fig. 7B, is reproduced below.

FIG. 7B



According to the Examiner, "Figure 7B illustrates an obvious omission of rib 578 from profile 572" (Answer 4, emphasis removed). The Examiner reasons that "when viewing Fig. 7B, the ribs 577 and 580 of profile 572 are adjacent to just one rib 579 instead of two ribs and during inter-locking operation, rib 580 can move upwardly and rib 577 can move downwardly, thereby flexing outwardly without flexing inwardly into the grooves as claimed" by Appellants (*id.*). According to the Examiner, "[t]he motivation

used by the Examiner to modify Tomic is taken from the disclosure of Tomic (col. 8, lines 16-19), where Tomic discloses that the inter-lockable profiles 571 and 572 may be constructed to have any number of ribs” (Answer 5).

We find no error in the Examiner’s prima facie case of obviousness.

For their part, Appellants contend that, as illustrated in Fig. 7 of Tomic,

if any two ribs are chosen which are immediately adjacent to either rib 578 or 579, these adjacent ribs cannot flex without flexing inwardly into at least one channel between the ribs. More specifically, ribs 578 and 580 are adjacent to rib 579, any flexing movement of rib 578 would impinge on at least one adjacent channel.

(Br. 4¹). This assertion does not account for the Examiner’s modification of Tomic, accordingly, we do not find it persuasive.

Appellants also key in on Tomic’s disclosure that the ribs can be any desired size or shape, asserting that “such a statement would not serve as prior art against a new shape of a feedback rib which achieved unexpected results” (Br. 5). Appellants also assert that “the bare sentence ‘[a]lternately, the first and second closure profiles 571, 572 may include any number of profiled elements’ (Tomic reference, col. 8, lines 18-19) does not preclude the patentability of a later invention which uses a certain number of closure profiles to achieve an unexpected result” (Reply Br. 2). Appellants do not direct our attention to an unexpected result that is associated with their claimed invention. Accordingly, we are not persuaded by Appellants’ assertions.

¹ All reference to the Brief (Br.) is to the brief received June 1, 2006.

Appellants assert “that Figure 7B is the result of hindsight gained by review of the disclosure, which is clearly improper” (Reply Br. 2). We disagree. The Examiner’s Figure 7B is a modification of Tomic that is drawn from Tomic’s disclosure. Specifically, Tomic expressly discloses that the first and second closure profiles (571 and 572) “are designed and constructed to engage with each other” and “may include any number of profiled elements” (Tomic, col. 8, ll. 16-19); and “any combination of feedback ribs or depressions, having any size or shape, may be used on the first and second closure profiles 571, 572” (Tomic, col. 8, ll. 37-39, emphasis removed). A minor modification of the prior art, such as limiting the number of profiled elements and associated feedback ribs or depressions, does not distinguish the claimed product from the prior art, particularly where the prior art expressly teaches that the device can be modified in that manner and that such device would be reasonably expected to possess the same function. *See KSR Int’l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1741, 82 USPQ2d 1385, 1396 (2007) (It is proper to “take account of the inferences and creative steps that a person of ordinary skill in the art would employ.”). *See also id.* at 1742, 82 USPQ2d at 1397 (“A person of ordinary skill is also a person of ordinary creativity, not an automaton.”).

On reflection, we find that the preponderance of the evidence favors the Examiner’s conclusion that claim 1 would have been *prima facie* obvious to a person of ordinary skill in the art at the time the invention was made. Accordingly, we affirm the rejection of claim 1 under 35 U.S.C. § 103(a) as unpatentable over Tomic. Since Appellants did not separately group or argue claims 2-4 they fall together with claim 1. 37 C.F.R. § 41.37(c)(1)(vii).

CONCLUSION

In summary, we affirm the rejection of record.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

dm

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